Supreme Court, U.S.
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No. 91-1702

In the Supreme Court of the United States

October Term, 1991

CARL W. CORTEZ, PETITIONER

v.

FIRST CITY NATIONAL BANK OF HOUSTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR CARL W. CORTEZ, PETITIONER

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QUESTIONS PRESENTED

1. Whether the Court of Appeals improperly dismissed the petitioner's appeal for lack of jurisdiction when the notice of appeal was filed in a timely manner and a timely motion for reconsideration had tolled the period for filing a notice of appeal?

2. Whether the failure of the respondents to send the petitioner copies of their motions to the court absolves the petitioners from any failure to address issues raised in the respondent's motions?

3. Whether the court must consider only issues presented by questions in the respondent's brief?

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TABLE OF AUTHORITIES

Case:
Enterprise International Inc. v.
Corporacion Estatol Petrolera
Ecuatoriana 762 F 2nd 464 5th Cir.

Constitution Statute and Rules:
28 U.S.C. 1254 (1)
Supreme Court Rule 14 (a)
Supreme Court Rule 15
Fed. R. App. P. 4
Fed.R. Civ. P. 6(e)

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1. The respondants are: Federal Deposit Insurance Corporation, First City National Bank of Houston, M Bank Houston, M Bank Memorial, Peoples Bank, Petrobank, and Village Bank

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1) dismissing the appeal is unreported. The opinion of the district court (Pet. App. A3-A6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1991. A petition for rehearing was denied on December 2, 1991. The petition for a writ of certiorari was filed on February 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 4, 1991 the district court, Houston, Texas, entered a final order of dismissal and an injunction.

2. On April 16, 1991 the petitioner filed a petition for rehearing in the district court. On May 17, 1991 the district court denied the petition for rehearing.

3. On July 15, 1991 the petitioner filed an appeal in the Fifth Circuit Court of Appeals. The court dismissed the appeal for lack of jurisdiction on October 30, 1991. The petition for rehearing was denied on December 2, 1991.

ARGUMENT

The court of appeals incorrectly dismissed the petitioner's appeal for lack of jurisdiction. The appeals court's decision is in conflict with decisions of this court and every other court. Accordingly, review by this court is warranted.

1. Respondent claims that the petitioner's appeal was untimely as the appeal was filed 102 days after the final order of dismissal on April 4, 1991 is a misstatement. The district court's final order and injunction was received by the petitioner, in Dunedin, Florida, on April 8, 1991, and a petition for rehearing was filed by the petitioned on April 16, 1991. Rule 6(e) of the F.R.C.P. allows an additional 3 days when notice is served upon a party by mail. Petitioner had 13 days to file his post-trial motion and did therefore toll this period for filing a notice of appeal.

2. The district court denied the petition for rehearing on May 17, 1991. The petitioner filed a notice of intention to appeal, in the district court on July 15, 1991. Rule 4 of appellate procedure requires that if the United States, or an officer or agency is thereof a party the notice of appeal may be filed in 60 days. The petitioner's notice of intention to appeal did toll the period for filing, therefore, the court of appeals improperly dismissed the appeal for lack of jurisdiction.

3. Respondent claims (R-5) "petitioner fails to address the lack of jurisdiction in the court of appeals, which required dismissal of the appeal." The respondent failed to advise the Court, in his brief, that the FDIC filed a motion to dismiss on September 24, 1991, and the FDIC did intentionally fail

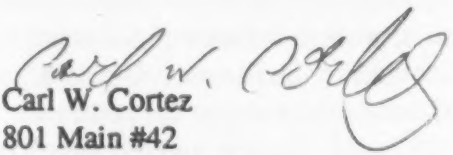
to send a copy of their motion to dismiss, to the petitioner. The petitioner learned of the motion to dismiss only because of a phone call to the clerk of the court of appeals. The petitioner filed a motion in response to the FDIC's motion to dismiss on September 30, 1991, and by affidavit and evidence presented with the motion in response showed the court that no copy of the respondent's motion to dismiss had been sent to the petitioner and that he could not respond to whatever statements the FDIC may have made to the court in their motion to dismiss, and further, evidence presented to the court of appeals in the motion in response showed that the respondents had filed motions in the Eleventh Circuit Court of Appeals on September 20, 1990 and did not send a coy to the petitioner. The court of appeals did not rule on the motion in response and did improperly dismiss the appeal for lack of jurisdiction.

4. The only question presented for the court's review in the respondent's brief is whether the court of appeals properly dismissed the petitioner's appeal for lack of jurisdiction [B-(1)] yet, the arguments in the respondent's brief [R-5(2)] contain arguments that were not raised by questions and should therefore not be considered by the court, Rule 14(a) further the respondant is obligated to point out any perceived misstatements in his brief in opposition (Rule 15). The petition for writ of certiorari alleges that 3 separate acts of perjury were committed by a branch of the United States Government, and others, and that 25 separate acts of fraud upon the court were committed by a branch of the United States Government, and others. The brief of the respondent failed to address these very serious allegations nor was it stated in the brief in response that the allegations of perjury and fraud were misstatements.

CONCLUSIONS

The court of appeals improperly dismissed the appeal for lack of jurisdiction. The petitioner could not address the issue of jurisdiction in the court of appeals when the respondent failed to send him a copy of their motion to dismiss. The court should address only the issue raised by question in the brief in response. The petition for a writ of certiorari should be granted.

Respectfully submitted,



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2. The petitioner's reliance on Enterprise International Inc. v. Corporacion Estatol Petrolera Ecuatoriana, 762 F. 2nd 464 (5th Circuit) is approprate.

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